

IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
December 4, 2007 Session

CARL J. KIRBY v. ARTHUR SCHARHAG AND BEATRIZ SCHARHAG

**Direct Appeal from the Circuit Court for Blount County
No. L-15356 Hon. W. Dale Young, Circuit Judge**

No. E2007-00304-COA-R3-CV - FILED MARCH 12, 2008

This matter originated in Sessions Court, where the Sessions Court held the defendants in contempt of court and awarded plaintiff attorney's fees. On appeal to Circuit Court, the Trial Court held the defendants were not in contempt of court but awarded attorney's fees and additional costs. On appeal, we affirm in part and reverse in part and remand.

Tenn. R. App. P.3 Appeal as of Right; Judgment of the Circuit Court Affirmed in Part, Reversed in Part, and Remanded.

HERSCHEL PICKENS FRANKS, P.J., delivered the opinion of the Court, in which CHARLES D. SUSANO, JR., J., and D. MICHAEL SWINEY, J., joined.

Arthur Scharhag and Beatriz Scharhag, Walland, Tennessee, *pro se*.

Lance A. Evans, Maryville, Tennessee, for appellee.

OPINION

This action originated in the General Sessions Court of Blount County on April 13, 2005, when plaintiff/appellee sued defendants/appellants seeking damages for trespassing and harassing plaintiff's tenants, and seeking removal of steel bars defendants had placed around a mail box.

Following an evidentiary hearing on March 23, 2006, the Circuit Judge entered an Order on March 31, 2006, which ordered the defendants to "remove all steel bars/stakes and wood

fence that the Scharhags installed or had installed, that is in the easement/right-of-way (known as Kirby Way) as shown by the plot map” The defendants were given 30 days from the entry of the Order to remove the steel bars, stakes and wood fence, and further provided that “all other causes of action against Arthur Scharhag and Beatriz Scharhag are dismissed” and ordered that each party would pay their own attorney’s fees. Yet another Order was then entered by the Sessions Judge on April 10, 2006 (*nunc pro tunc* to March 23, 2006), dismissing other party defendants, Lucky C. Watson and Drama F. Watson, and again reciting that the action against the defendants Scharhag was dismissed.

On May 10, 2006 plaintiff filed a “Motion to Enforce Order and for Contempt”. The Motion stated that defendants had not removed the fence, as ordered, and further asked that the defendants be held in contempt of court and that defendants be incarcerated, if necessary, to enforce compliance with the Court’s Order. Plaintiff also asked to be compensated for his attorney’s fees. A hearing on the Motion was held on June 21, 2006, and the Sessions Judge Ordered: that the defendants were found in “willful contempt” of Court for “failure to remove all of the wood fence...” and that the defendants “shall pay to Carl Kirby attorney fees and expenses totaling \$1,577.25” and the cost was taxed to the defendants.

Defendants timely perfected an appeal to the Circuit Court.

The Circuit Judge conducted a trial on the 19th day of December, 2006 and reaffirmed part of the Judgment of the Sessions Court entered on July 5, 2006, but “holds that Defendants, Arthur Scharhag and Beatriz Scharhag, are not in contempt of Court”. The Court then ruled that Plaintiff, Carl Kirby, “shall have a total judgment in the amount of Four Thousand Three Hundred Four and Fifty cents (\$4,304.50)” against defendants, and taxed the costs against defendants.

Defendants timely perfected an appeal to this Court.

The only issue before this Court is whether the Circuit Court erred when it awarded Mr. Kirby a Judgment for the expenses he had incurred. The Scharhags are pursuing the appeal *de novo* and their brief is not helpful. They have included in the brief many issues and documents that were not before the Circuit Court and may not be considered by this Court. However, in the Statement of the Issue Presented for Review the issue of the monetary award to Mr. Kirby is stated as follows: “[I]f the Defendants [the Scharhags] are not in contempt of court at this time, the Scharhag[s] are Not Responsible to pay Carl J. Kirby his Losses, and this is based on the Testimonies of the Appellee/Carl J. Kirby and his attorney and surveyor Mr. McClellan” Later, in their brief, the Scharhags expressed the issue again by arguing that “if they [the Scharhags] were not in contempt of Court the Scharhag[s] feel they are not Responsible of Mr. Carl J. Kirby Expenses/Losses of \$4,304.50”

While the statement of the issue on appeal is not as clearly presented as the Court would expect if an attorney were responsible for the appeal, the statement of the issue of whether the award to Mr. Kirby was appropriate is clear enough for this Court to consider it. *See Nash v.*

Waynick, No. M2000-02096-COA-R3-CV, 2001 WL 360703 at *3 (Tenn. Ct. App. April 12, 2001).

Appellee, in his brief, ignores the fact that the Circuit Court held that the Scharhags were not in contempt, and merely argues “when a party is forced to incur attorney’s fees associated with the filing of petitions for contempt . . . it is within a court’s discretion to award attorney fees to the prevailing party pursuant to Tenn. Code Ann. § 29-9-105.” This argument does not address the issue since Kirby was not the prevailing party on the contempt charge. The issue before the Circuit Court as set forth in the statement of the evidence prepared by Kirby, was “the only issues before the Court were whether the defendants were in contempt of Court and whether defendants should pay plaintiff’s expenses totaling \$1,577.25.” (emphasis original).

The Circuit Court’s holding that the Scharhags were not in contempt did not allow the Trial Court to award attorney’s fees to Kirby. It is a well established principle under Tennessee law that an award of attorney’s fees is not an appropriate element of damages unless such an award is provided for by contract or by statute. *Morrow v. Bobitt*, 943 S.W.2d 384 (Tenn. Ct. App. 1996); *State v. Brown & Williamson Tobacco Co.*, 18 S.W.3d 186 (Tenn. 2000). While the Circuit Court did not articulate a basis for the award, Kirby on appeal, argues Tenn. Code Ann. § 29-9-105 supports the Trial Court’s decision. While a court has the discretion to punish a party for failing to comply with the Court’s prior order, such punishments can only be imposed after finding that the contempt is willful. *Ahern v. Ahern*, 15 S.W.3d 73, 79 (Tenn. 200); *see* Tenn. Code Ann. § 29-9-102 through 105). The Circuit Court’s Order not only held the Scharhags’ inaction was not willful, it further held they were not in contempt.

An exhibit in the record shows that \$1,500.00 of the total awarded by the Trial Judge was for attorney’s fees. The plaintiff, before the Circuit Court, was permitted to make claim for expenses incurred in the initial trial which Judgment had become final before the Motion for Contempt was ever filed in the Sessions Court.

The Circuit Court did not provide a basis for its award of non-attorney’s fee expenses in its order and the litigants have not addressed the basis for the award in their briefs. Tenn. R. Civ. P. 54.04 (1) and (2) provide the basis of awarding court costs and certain discretionary costs to the prevailing party. Rule 54.04(2) specifically lists the type of discretionary costs allowable as: court reporter expenses for depositions and trial, expert witness fees for depositions and trial, interpreter fees and guardian ad litem fees. The Rule mandates that “a party requesting discretionary costs shall file and serve a motion within thirty (30) days after entry of judgment”. *See Kendall v. Cook*, No. E2005-02763-COA-R3-CV, 2006 WL3501325 at *2 (Tenn. Ct. App. Dec. 6, 2006); *Stalsworth v. Grummons*, 36 S.W.3d 832, 835 (Tenn. Ct. App. 2000); *Battleson v. Battleson*, 223 S.W.3d 278, 287 (Tenn. Ct. App. 2006). A party seeking discretionary costs must file the required motion timely and must support the motion with an affidavit detailing these costs, verifying that they are accurate and that they have actually been charged, and that they are necessary and reasonable. *Sanders v. Gray*, 989 S.W.2d 343, 345 (Tenn. Ct. App. 1999).

While the Rules of Civil Procedure do not apply to the Sessions Court’s proceedings,

the original Judgment in Sessions Court was not appealed and became final and the costs associated with trying that case was not raised as an issue in the appeal from the contempt Judgment which did not encompass any cost, other than the attorney's fees and normal court costs. Accordingly, we reverse the Judgment of the Circuit Court awarding attorney's fees and expenses in the amount of \$4,394.50.

The Judgment of the Circuit Court is otherwise affirmed and the cause remanded, with the cost of the appeal assessed one-half to the plaintiff, Carl J. Kirby, and one-half to the defendants, Arthur and Beatriz Scharhag.

HERSCHEL PICKENS FRANKS, P.J.